

ESTILL ESTEP

IBLA 93-670

Decided August 18, 1994

Appeal from a decision of the Assistant Deputy Director, Office of Surface Mining Reclamation and Enforcement, affirming action taken by the Lexington Field Office in response to a citizen's complaint. TDN 92-081-414-057.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Citizen Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

In response to a citizen's complaint that blasting at a coal mining operation had damaged his house, OSM properly declined further enforcement action after investigation revealed there was insufficient evidence to show there was blasting damage.

APPEARANCES: Estill Estep, Sassafras, Kentucky, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Estill Estep has appealed from an April 16, 1993, decision of the Assistant Deputy Director, Office of Surface Mining Reclamation and Enforcement (OSM), affirming a January 14, 1993, decision of the Director, Lexington, Kentucky, Field Office, OSM, determining the Kentucky Department of Surface Mining Reclamation and Enforcement (DSMRE) had taken appropriate action in response to Ten-day Notice (TDN) 92-081-414-057. The TDN was issued on September 28, 1992, in response to Estep's citizen's complaint against Diamond May Coal Corporation.

On September 23, 1992, Estep filed a complaint with the London, Kentucky, Area Office, OSM, against Diamond May Coal operations at Anco, Kentucky. In response thereto, OSM issued a TDN to DSMRE, dated September 28, 1992, specifying allegations of damage from blasting operations near a citizen's home in violation of 405 KAR 16:120, problems caused by dust from a loadout facility in violation of 405 KAR 16:170,

and lack of a valid permit for the operation at issue or authorization to conduct activities within 300 feet of a home in violation of 405 KAR 7:040, 24:040.

By letter to OSM dated October 5, 1992, DSMRE explained that an inspection of the mining operations did not find activities outside the scope of the operation or within 300 feet of Estep's home. DSMRE stated that, as a result, it would not cite Diamond May Coal for violations of 405 KAR 16:170, 7:040, or 24:040. DSMRE requested an extension of time to monitor the blasting with a seismograph placed at Estep's home. After a seismograph was installed and Diamond May Coal's operations were monitored for a 2-week period without evidence of blasting violations, DSMRE responded in a letter to OSM dated November 10, 1992, that it would not cite Diamond May Coal for a violation of 405 KAR 16:120 (damage from blasting). Further, DSMRE reported that it had observed the coal operation on several occasions and did not detect a fugitive dust violation, and that it was researching a possible exemption from buffer restrictions by reason of valid existing rights.

On January 14, 1993, the Director, Lexington Field Office (LFO), reported to Estep that DSMRE had issued a notice of noncompliance to Diamond May Coal on January 29, 1992, for blasting outside limits imposed by an approved blasting design, a violation that was abated on February 24, 1992. He stated that subsequent monitoring did not confirm any other blasting violations, including blasting within the prescribed buffer zone. He then reported and accepted DSMRE's explanation that the operation was exempt from a 300-foot buffer zone between mine operations and Estep's home because of valid existing rights in permit 860-8006 held by Diamond May Coal. As for dust, he concluded that the problem appeared to come from a section of State Highway 1088 in front of Estep's home and not from the permit area. Citing a joint OSM and DSMRE investigation into the alleged blasting damage to Estep's home, the Director, LFO, explained that there was insufficient proof to establish that any damage to the dwelling was blasting related. Finding that DSMRE had taken appropriate action regarding the TDN, he concluded that OSM was not required to take further action.

Estep filed a request for an informal review on March 5, 1993, to which the Assistant Deputy Director, OSM (Washington, D.C., Office), responded in a decision dated April 16, 1993. She affirmed the determination that DSMRE had taken appropriate action and found no further action by OSM was required. With respect to the alleged blasting damage to Estep's home, she stated she had reviewed the field office's investigation and found there was not adequate proof of blasting-related damage. Estep appealed timely. <sup>1/</sup>

<sup>1/</sup> In a letter to Estep dated July 15, 1993, the Assistant Director, Field Operations, OSM, stated that Estep had not timely appealed the Assistant Deputy Director's decision. The case file does not show when Estep received her decision; however, the notice of appeal was received by the Board on May 7 in an envelope postmarked May 4, 1993. This filing was timely, as May 4 was 18 days after the decision was issued. See 43 CFR 4.1107(g), 1282(b).

He appears to have initiated his complaint after the blasting violation cited in January 1992 when he observed some damage to his home. As the other two issues of this appeal (lack of authority to operate within 300 feet of a dwelling and presence of fugitive dust), appear to be ancillary issues for which OSM provided sound responses, review of this appeal begins with the blasting-damage question.

In William J. Hamilton, 105 IBLA 160 (1988), the Board of Land Appeals reviewed a situation where damage to a dwelling was alleged to have resulted from blasting at a nearby surface mine. The case involved elements also found in the instant appeal. Engineers for OSM set a seismograph near a house after damage was alleged to have occurred. No blasting occurred while the seismograph was in place, and no evidence was found by OSM to link the damage to the blasting. 105 IBLA at 163. In Hamilton, the Board's attention was directed towards a statutory duty to "review [OSM] determinations, based upon its inspections of appellants' dwellings, that no violations of the general performance standard to conduct blasting so as to prevent damage to public or private property outside the permit area had occurred." 105 IBLA at 164. The appellants in Hamilton directly challenged conclusions about blast damage made by OSM's engineers with evidence to the contrary. The Board found that the homeowners had provided sufficient detail about observed blasting effects to present "a question of fact as to whether the blasting was a causative factor in damage to the \* \* \* dwelling" and referred the case for a hearing. 105 IBLA at 165.

[1] In the instant appeal, unlike the Hamilton case, Estep has not presented contrary evidence tending to put in issue facts found by the OSM investigation. A principle of practice before this Board is that an appellant challenging a decision must show error in the decision; one who does not state a reason for appeal and support his allegation with argument or evidence showing error cannot prevail. Add-Ventures Ltd., 95 IBLA 44, 50 (1986). In the instant case OSM properly declined to undertake further action in response to Estep's citizen's complaint after investigation showed that the alleged violations had not occurred, in the absence of a contrary showing by Estep. See, e.g., Peter J. Rosati, 119 IBLA 219 (1991). At best, the record shows damage to Estep's home which he believes is blasting related. He has not, however, offered any evidence in support of his allegation that Diamond May Coal's blasting caused it. Diamond May Coal cannot be held responsible for damage to Estep's home on the record before us.

The Director, LFO, determined that OSM staff investigation into Estep's complaint found no reason to suspect Diamond May Coal was responsible for damage to Estep's building. Similarly, the Assistant Deputy Director reviewed data collected by OSM's engineers and their conclusions in rendering her decision. In response, Estep objected to the findings and conclusions rendered by OSM's experts without indicating why their findings were in error. Further, Estep has not alleged error in OSM's conclusion that the alleged fugitive dust problem did not originate with Diamond May Coal operations or that the blasting at issue violated neither the permit nor regulations. OSM's conclusions on these issues were well-reasoned and

are supported by the record. As a result, it must be concluded that OSM properly declined to take further action on the citizen's complaint.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness  
Administrative Judge

I concur:

John H. Kelly  
Administrative Judge

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